

CITY OF GARDNER BOARD OF ZONING APPEALS Staff Report

TO: Board of Zoning Appeals

FROM: Frederick L. Sherman, AICP, Community Development Director

DATE: January 21, 2004

SUBJECT: BZA-03-01; Consider an appeal regarding the adoption of rezoning Ordinance 2081, Case No. Z-03-11, rezoning property from A, Agricultural District, to R-1, Single Family Residential District.

1. **APPLICANT:** Kelly Company, L.C., with legal services provided by Freilich, Leitner & Carlisle.
2. **REQUESTED ACTION:** Appeal of the Gardner Governing Body's approval of Ordinance No. 2081, rezoning case No. Z-03-11, rezoning property from A, Agricultural District, to R-1, Single Family Residential District.
3. **LOCATION:** The subject property is 153.78 acres of land located on the northwest corner of the intersection of S. Waverly Road and W. 167th Street.
4. **APPEAL CRITERIA:** Pursuant to the requirements of K.S.A. 12-759 and Section 16-1601.3 of the City Code, the Board of Zoning Appeals may hear an appeal by any person aggrieved, or body affected by any decision of the officer administering the provisions of the zoning ordinance.

K.S.A. 12-759(d) states (emphasis added):

*Appeals to the board of zoning appeals may be taken by any person aggrieved, or by any officer of the city, county or any governmental agency or body affected by any decision of the officer administering the provisions of the zoning ordinance or resolution. Such appeal shall be taken within a reasonable time as provided by the rules of the board, by filing a notice of appeal specifying the grounds thereof and the payment of the fee required therefor. The officer from whom the appeal is taken, when notified by the board or its agent, shall transmit to the board all the papers constituting the record upon which the action appealed from was taken. **The board shall have power to hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of the zoning ordinance or resolution.** In exercising the foregoing powers, the board, in conformity with the provisions of this act, may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination, and to that end shall have all the powers of the officer from whom the appeal is taken, may attach appropriate conditions, and may issue or direct the issuance of a permit.*

5. **STAFF COMMENTS:** The applicant for this appeal request, Kelly Company, L.C., currently holds oil lease agreements on several properties near and within the City of Gardner, including this subject property. The provisions of Chapter 4, Article 4, of the Gardner City Code regulates oil and gas Wells within the City limits. Section 4-418 restricts the drilling of any new oil or gas wells within the City limits to only property zoned "Agricultural". The City Council approved a request by the property owner of this subject property to change the zoning from A, Agricultural, to R-1, Single-Family Residential, with the adoption on October 20, 2003, and publication of Ordinance 2081.

K.S. A. 12-760 and 16-1535 of the City Code provides that an appeal of the Governing Body's decision on a rezoning shall be filed in the District Court of Johnson County. K.S.A 12-760 states:

Same; appeals to district court. (a) Within 30 days of the final decision of the city or county, any person aggrieved thereby may maintain an action in the district court of the county to determine the reasonableness of such final decision.

In summary, the Board of Zoning Appeals does not have the statutory or code authority to render a decision on an appeal of the Governing Body's decision of a rezoning request. The appeal must be filed in District Court.

A petition, or law suit, has been filed in the District Court of Johnson County by the applicant, Kelly Company, L.C., against the City of Gardner regarding the Gardner Governing Body's approval of Ordinance No. 2081, rezoning case No. Z-03-11, rezoning property from the A, Agricultural District, to the R-1, Single Family Residential District. The applicant's legal council has confirmed to planning staff that the purpose of filing this appeal request before the Gardner Board of Zoning Appeals is to follow through all possible legal avenues of redress prior to presenting their case in District Court.

6. **STAFF RECOMMENDATION:** Staff recommends that the Board of Zoning Appeals deny the request for an appeal regarding the adoption of rezoning Ordinance 2081, Case No. Z-03-11, rezoning property from A, Agricultural District, to R-1, Single Family Residential District, based on the fact that the Board of Zoning Appeals does not have the statutory or code authority to render such a decision.